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In the

Supreme Court of the United States

October Term, 2000

ZELMAN, Petitioners,
v.
SIMMONS-HARRIS, Respondents

HANNA PERKINS SCHOOL, Petitioners
v.
SIMMONS-HARRIS, Respondents

TAYLOR, Petitioners,
v.
SIMMONS-HARRIS, Respondents

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, CALIFORNIA SCHOOL BOARDS ASSOCIATION, COLORADO ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, OHIO SCHOOL BOARDS ASSOCIATION AND WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The interest of the *amici curiae*[1] is as follows.

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U. S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation.

The school boards associations in California, Colorado, Michigan, Ohio, and Washington represent all or most of the public school boards in their respective states. The goal and mission of each association is to support the work of local school boards as a means of improving local public education and student achievement. As a group, they provide training, information, and materials on a range of management, policy, and legal issues that are of importance to education leaders. Each of these states has experienced either a voucher program or proposal. With the exception of Ohio, voters in each state have soundly rejected these measures. In addition, all *amici* have had a longstanding interest in the effective development and implementation of local school board policies, including those assuring compliance with the Establishment Clause.

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Sup. Ct. Rule 37.3. The undersigned counsel has authored this brief, and no person or entity other than *amici* has made a monetary contribution to its preparation or submission. Sup. Ct. Rule 37.6.

STATEMENT OF THE CASE

In 1995, the Ohio General Assembly enacted the Ohio Pilot Project Scholarship Program, a voucher program in the Cleveland School District. Ohio Rev. Code Ann. § 3313.975(A) (West 2000). Ohio's General Assembly enacted the voucher program after a United States District Court placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction because of financial mismanagement at the local level. The voucher program gives tuition money to families with children in kindergarten through the eighth grade. Preference is given to students from families with income that is less than 200 percent of the poverty level. Students who are not from low-income families become eligible after all students from low-income families have been considered for placement. Ohio Rev. Code Ann. 3313.978(A) (West 2000). Students do not have to be public school students to be eligible; those already enrolled in a private school are also eligible. Scholarship checks, although made payable to the parent, are mailed directly to the child's school. The parent is then required to endorse the check over to the private school. *Simmons-Harris v. Zelman*, 234 F.3d 945, 948 (6th Cir. 2000). The voucher program requires participating schools to cap tuition at $2,500 per student per year, and for low-income families, the State pays 90 percent of the tuition the school actually charges. Ohio Rev. Code Ann. 3313.976(A)(8), 3313.978(A) (West 2000). For other families, the State pays 75 percent of a school's tuition, up to a maximum of $1,875. *Id.* In the 1999-2000 school year, 3,761 students enrolled in the program, and 60 percent of the enrollees were from families at or below the poverty level. Of these students, 3,632 (96 percent) were enrolled in sectarian schools. *Simmons-Harris v. Zelman*, 234 F.3d at 949.

In 1999, the Ohio Supreme Court held that the program violated the state constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 103, 216 (Ohio 1999). Later that year, the Ohio General Assembly re-enacted the program in a way to withstand a challenge based on the state constitution. However, all other relevant features of the program remained the same. The program was then challenged again in federal district court for violating the Establishment Clause. The U.S. District Court for the Northern District of Ohio found the voucher program unconstitutional because it provided unrestricted grants to parents, in the form of scholarships, to send their children to private schools – 82 percent of the eligible schools were religious. The court determined that "the Cleveland Program has the primary effect of advancing religion." *Simmons-Harris v. Zelman*, 54 F.Supp.2d 725, 741-42 (N.D. Ohio 1999).

The State appealed that decision; however, the United States Court of Appeals for the Sixth Circuit also held that the voucher program violated the First Amendment's Establishment Clause. The court concluded that the Cleveland voucher program directly funnels monetary subsidies to religious institutions. *Id.* at 960. As such, the program has the primary effect of advancing religion and constitutes an endorsement of religion and sectarian education. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). The Sixth Circuit reached its conclusions based on the parallels between the Cleveland program and the New York tuition reimbursement scheme invalidated in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). *Simmons-Harris*, 234 F.3d at 958.

On December 22, 2000, the State filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Court of Appeals denied the petition on February 28, 2001. On March 8, 2001, the court issued a stay of its mandate pending the filing of petitions for *certiorari*.

ARGUMENT

I. THE SIXTH CIRCUIT COURT WAS CORRECT IN HOLDING THAT THIS VOUCHER PROGRAM VIOLATES THE ESTABLISHMENT CLAUSE.

The Sixth Circuit Court of Appeals was correct in concluding that the Cleveland voucher program violates the First Amendment Establishment Clause. The program's core function – to divert public taxpayer money to support private, religious schools – is a transgression of both historic and contemporary legal standards. There is no reason for this Court to disturb that finding.

The Sixth Circuit's reliance in part on *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), is well placed. That case's analytical framework remains relevant today. In *Nyquist*, this Court held that there was no way to ensure that funds received by religious schools under a tuition reimbursement program, would be restricted to secular purposes.

Some argue that it is acceptable to have "grants disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice," *Agostini v. Felton*, 521 U.S. 203, 226 (1997). Writing in *Agostini*, the majority opinion emphasized that a key component was "... the genuinely independent and private choices of individuals," quoting *Witters v. Washington Dept. of Servs. For Blind*, 474 U.S. 481, 487 (1986). But, this is a different circumstance for three reasons: first, because the method of disbursement is effectively a direct grant to the private school; second, the funds seek only to benefit private school parents; and third the private schools benefited are overwhelmingly religious schools.

In *Mueller v. Allen*, 463 U.S. 388 (1983) this Court upheld an education tuition tax deduction under the thinking that it was a neutral benefit to all parents. The program included deductions for a variety of educational expenses, *Id.* at 391, for all parents. *Id.* at 397. Further, it operated to the benefit of religious schools only as a function of individual parents' choice. *Id.* at 401. This is not the case here. The Cleveland voucher program does not support broad educational expenses, only private school tuition. This program supports only those "choices" of private school parents. Interestingly, in the first year of the program, 25 percent of the vouchers went to parents whose children were already enrolled in private school. *The Cleveland Voucher Program*, AFT on Vouchers, (1997), *at* http://www.aft.org/research/ reports/clev/contents.htm. In the current year 37 percent of new vouchers went to students who were continuing in private schools.

Additionally, in this program the state functionally writes a check to the private school. Parents never see the funds individually. "Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipient; thereafter, the parents must endorse the check to the school." *Simmons–Harris*, 72 F.Supp. 2d at 836.

Like in *Nyquist*, the Cleveland program is overwhelmingly populated with religious schools. This Court said in *Mitchell v. Helms*, 530 U.S. 793 (2000), that it is exactly that kind of profile which has led the Court to strike down direct payments to private schools in the past. That opinion cited the "serious concerns about whether the payments were truly neutral," and notes in a parenthetical about *Nyquist* that "... payments were allocated per-pupil but were only available to private, nonprofit schools in low-income areas, 'all or practically all' of which were Catholic." 530 U.S. at 820, *quoting Nyquist, 413* at 768.

While proponents may seek to describe this voucher program as an escape hatch for low-income children in

troubled schools, the truth of the matter is that little "choice" actually exists. The market beyond public schools is dominated by religious institutions. Here, 82 percent of the schools eligible to participate in this program were religious in nature. *Simmons- Harris v. Zelman*, 54 F.Supp.2d 725, 741 – 42 (N.D. Ohio 1999). The structure of the tuition cap works to attract religious schools and religious school students. As a result, in the 1999 – 2000 school year 96percent of the students participating in the program were religious school students. *Simmons- Harris v. Zelman*, 234 F.3d at 949. The disparity essentially means this: vouchers are a *sine qua non* to attending a religious school. Despite attempts to wrap that reality in a seemingly neutral veneer, the reality exists.

The fact that the program is targeted to a specific population (poor children) does not alter the Establishment Clause analysis. Evidence from the Cleveland program calls into question the argument that the program's purpose is to enable low-income students to enter a private school of their choice. In fact, while *preference* is given to low-income students – those whose families' income is less than 200 percent of the federal poverty level – the program places *no* income cap on voucher applicants. A January 1999 state audit revealed that students whose families' annual income ranged from $50,781 to $90,000 received vouchers. Jim Petro, *Cleveland Scholarship and Tutoring Program Special Audit Report*, Auditor of the State of Ohio, January 5, 1999. In the most recent school year, 22 percent of the participating families had incomes higher than 200 percent of the federal poverty level.

This Court should refuse this case because the Sixth Circuit faithfully followed *Nyquist* and other Supreme Court precedent and came to the correct finding that the *effect* of the Cleveland voucher program is to promote religion. Other lower courts should similarly see the issue clearly, negating a need for this Court's involvement.

II. STATE LEGISLATURES AND VOTERS HAVE REJECTED VOUCHERS. SINCE THE IDEA IS WANING THERE IS NO NEED FOR U.S. SUPREME COURT ATTENTION.

Petitioners argue the voucher debate needs this Court's involvement; however, we respectfully disagree. The facts belie the contention that states have been unable or unwilling to deliberate over vouchers without a definitive ruling from the Court. Voters and lawmakers across the nation have examined and rejected vouchers for public policy reasons – not constitutional reasons. They have considered whether vouchers are a solution for improving the education of all students and have concluded that they are not.

A. Vouchers are consistently being rejected by the voters and state legislatures.

The public and lawmakers have come to the conclusion that vouchers are bad public policy. During the 2000 state legislative sessions, only one state, Florida, has actually approved a voucher program. Voters have been particularly emphatic and have soundly rejected school voucher ballot initiatives.

Voucher proposals were rejected in 1996 by 65 percent of voters in Washington state; in 1993 by 70 percent of voters in California; in 1992 by 67 percent of voters in Colorado; in 1978 by 74 percent of voters in Michigan; and in 1972 by 55 percent of voters in Maryland. Michael A. Resnick, *Why Vouchers Won't Work*, National School Boards Association, 1998, at 47.

In November 2000, 71 percent of the voters in California rejected a proposal to give every student in the state a $4,000-a-year tuition voucher. Associated Press, *No Voter Support for Vouchers*, Milwaukee Journal Sentinel Online, November 9, 2000, at http://www.jsonline.com/

election2000/ap-eln-failing-vou110900.asp. The California votes were consistent across racial, economic and political lines. Seventy seven percent of Latinos, 70 percent of whites, and 68 percent of African-Americans voted against the plan. In addition, a majority of Democrats, Republicans, and Independents – regardless of income, education level, age, or gender – rejected the proposal. *Exit Polls for California*, CNN.com Election 2000, at http://www.cnn.com/ELECTION/2000/epolls.

The story was the same in Michigan, when on the same day 69 percent of the voters rejected a proposal to give students in seven school districts a voucher worth about $3,300. Associated Press, *No Voter Support for Vouchers*, Milwaukee Journal Sentinel Online, November 9, 2000, at http://www.jsonline.com/election2000/ap-eln-failing-vou110900.asp. Again the votes were consistent across various demographic lines. Seventy-seven percent of African-Americans and 69 percent of whites voted against the proposal, as did a majority of Republicans, Democrats, and Independents. *No Voter Support for Vouchers*, Milwaukee Journal Sentinel Online, November 9, 2000, at http://www.jsonline.com/election2000/ap-eln-failing-vou110900.asp. Among voters in Detroit's county, a district in which many students would have been eligible for vouchers, 72 percent of the voters rejected the plan. http://www.sos.state.mi.us/election/results.

For almost 30 years, voucher proponents have tried unsuccessfully to garner public support for their position. However, voters have left absolutely no doubt about their staunch opposition to vouchers.

B. Voters and state legislatures recognize that vouchers are bad public policy.

1. Vouchers weaken public schools.

Private school tuition vouchers will significantly damage this nation's system of free public education for all. In May 2001, during a failed attempt to pass a school voucher amendment in Congress, Representative Richard Armey (R-TX) offered this reasoning in support of vouchers: "We walk away from these kids in every regard. We *never* fix these schools. Where is the heart?" (emphasis added) Juliet Eilperin, *House Advances Education Overhaul*, Washington Post, May 24, 2001, at A1.

In many ways, this is precisely why vouchers are so wrong. We ought not to continue to walk away from *any* of these children. We ought not to allow another day to pass without fixing *every* school that needs fixing. Yet, vouchers are akin to waving the white flag. As Louis V. Gerstner, Chairman and Chief Executive Officer of IBM, put it, this issue boils down to commitment: will this nation show a commitment to *all* students, or will we embrace a system that benefit a chosen few at the expense of many others?

2. Vouchers drain needed funds from public schools.

Voucher programs create a direct drain on public school budgets. Milwaukee's voucher program, which serves just under 10,000 students, cost taxpayers $49 million this school year. State aid, half of which is diverted from the Milwaukee Public Schools and half of which is diverted from all other Wisconsin public school districts, covers this cost. As a result, 238 public school districts across the state (including Milwaukee) are *losing* taxpayer dollars to private schools in Milwaukee and increasing local property taxes to make up for the missing funds. *Funding for the Milwaukee*

Parental Choice Program, Wisconsin Legislative Fiscal Bureau, May 8, 2001, at 5.

At the same time that millions of dollars are flowing to private schools, the Milwaukee Public Schools, which serve 10 times as many students as the voucher program, are forced to cut programs because of a budget shortfall of up to $19.6 million. Sam Schulhofer-Wohl, *Protesters Slash at MPS Budget Plans*, Milwaukee Journal Sentinel, March 28, 2001, at 1B. Last year, the public system faced $32 million in budget cuts. Robert C. Johnston, *Union-Backed Candidates Win Milwaukee Board Seats*, 20 Education Week , 3 (2001).

The smaller voucher program in Cleveland cost taxpayers $13.9 million this fiscal year. Funding for this program has also come from state aid that would otherwise have gone to disadvantaged public schools students in the city.

3. Public schools realize no gains from students leaving the system under vouchers.

Vouchers drain dollars from the public's schools without eliminating or even addressing those schools' many needs. Selectively removing children from the public school system does not reduce the current infrastructure needs. This drain of badly needed money diminishes efforts to continue or institute critical reforms, and undermines attempts to improve education for all students.

When students leave the public schools pursuant to a voucher program, they do not do so in sufficient numbers or within any pattern that would allow the school district to redirect or reduce the need for resources. In Cleveland, the loss of 3,761 students to private schools through vouchers has not reduced the capital or human resource needs of the district's schools, which serve 77,000 students. Because the voucher students are scattered throughout the system school officials cannot eliminate a class, layoff a teacher, or

close a school; the program merely creates a few vacancies in ongoing public school programs.

4. Voucher programs leave the public schools with high need students and declining resources.

Not only do vouchers leave behind many students in public schools with fewer resources, but also they leave behind the neediest students. Schools participating in voucher programs do not admit our public schools' most challenging and expensive-to-educate students. For example, in a memo to the Ohio Governor's office, David Brennan, a leading voucher proponent and one-time operator of voucher schools, noted: "Numerous scholarship (voucher) recipients were discouraged from taking their scholarships to private schools with the full knowledge that none of the existing private schools will be able to handle a seriously handicapped child." Dennis J. Willard and Doug Oplinger, *Voucher Plan Leaves Long List of Broken Vows*, Akron Beacon Journal, Dec. 14, 1999, at http://www.ohio.com/bj/ projects/whose_choice/docs/029046.htm. A researcher at the Ohio Department of Education confirmed these exclusionary practices. The researcher informed agency staff that, at Brennan's voucher schools, "students with learning disabilities or other special needs were actively counseled out of the program." *"Directory of Documents for 'Whose Choice?'"* Akron Beacon Journal Online, January 18 2000, 97-1000-1 Rogers p. 1, at http://www.ohio.com/ bj/projects/whose_choice/.

Further examples from Milwaukee illustrate the problem. The Milwaukee voucher schools include the Agape Center for Academic Excellence. This school has indicated that it cannot serve "severely physically disabled students who need on-site medical supervision or unusual classroom accommodations (space is limited)." In addition, it cannot serve students who are "hearing disabled unless they can read lips." *Agape Center for Academic Excellence*,

Empowering Parents for Informed Choices in Education, http://epic.cuir.uwm.edu/EPIC/English/data/agape/html. Similarly, the Blessed Sacrament School has indicated that "students who are 2-3 years below grade level cannot be realistically brought up to grade level because we do not have a tutorial/learning center to accommodate their needs." *Blessed Sacrament School*, Empowering Parents for Informed Choices in Education, http://epic.cuir.uwm.edu/EPIC/English/data/blesse/html. Our Lady Queen of Peace School has stated, "we have no programming for emotionally disturbed or educationally mentally retarded youngsters. We can educate children with physical disabilities, but we have no easy access to the school building." *Our Lady Queen of Peace*, Empowering Parents for Informed Choices in Education, http:// epic.cuir.uwm.edu/EPIC/English/data/queeno/html.

When selected students are siphoned into private schools, the percentage of students with high needs who remain in the public schools increases. When funds are reduced to public schools in favor of private schools, it is more difficult for districts to pay for the rising costs of high needs and special education programs. Districts already face a monumental challenge in this regard. Today, 26 years after Congress made a promise to fully fund the Individuals with Disabilities Education Act (IDEA) by paying 40 percent of the associated costs, they continue to fund no more than 15 percent.

5. Vouchers provide no accountability for the use of public funds.

Vouchers make a mockery of the notion that any program funded by the taxpayers ought to be accountable to those taxpayers. Vouchers channel tax dollars into private schools that need not comply with open meetings and records laws, adhere to state academic standards, or report on students' academic achievement. Thus, although the

public has an interest in what students are taught, how well they are taught, and under what circumstances, taxpayers' oversight of the expenditure of these public funds is eliminated.

Moreover, public funds should ensure public protections. Currently, taxpayer funds used for public education are sent to school districts with the condition that certain rules and regulations must be followed. These "strings" ensure that health and safety standards are being met and that anti-discrimination laws are being followed. Schools at which vouchers are used do not have to adhere to the same rules that public schools must adhere to in order to receive state and federal funding.

Loose regulations and the lack of public oversight inherent in voucher programs have contributed to several alarming incidents. For example, two Milwaukee voucher schools overcharged taxpayers $390,000 by falsely inflating their student enrollment numbers. Clarence Page, *Reality Check on School Vouchers*, The Dayton Daily News, March 18, 1996, at 6A. Similarly, taxpayers in Cleveland paid nearly $3.5 million for taxicabs to transport students to voucher schools, including $419,000 in erroneous overpayments that were made for students who were absent or not even enrolled in the voucher school. *Cleveland Scholarship and Tutoring Program Special Audit Report, July 1, 1995 through June 30, 1998*, State of Ohio, 1998, at 7.

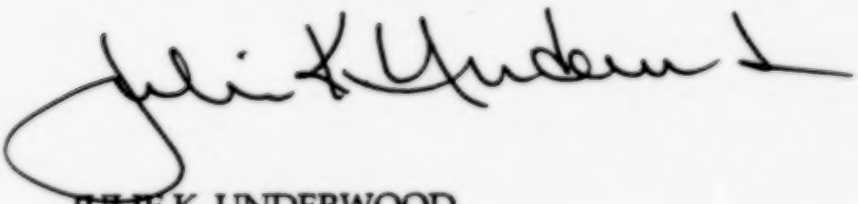
Another Cleveland voucher school, the Islamic Academy School of Arts and Sciences, enrolled as many as 100 students and claimed as much as $268,000 in taxpayer money for two years before journalists revealed that the 110-year old school building had no fire alarm, no sprinkler system, broken windows, lead paint flaking off the walls at dangerous levels, and little, if any, heat in the winter. Furthermore, two-thirds of the school's teachers were unlicensed, including one who had been convicted of first-degree murder for a bar room shooting. Scott Stephens and

Mark Vosburgh, *Murderer on Staff of State-Funded Private School*, The Plain Dealer, July 1, 1999, at 1A.

CONCLUSION

For the above reasons, we ask this Court to deny *certiorari* and to permit the Sixth Circuit's well-crafted decision in this case to stand.

Respectfully submitted,



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